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In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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OPINION BELOW

The memorandum and order of the district court (J.S. App. A) are reported at 396 F. Supp. 308.

JURISDICTION

The order of the three-judge district court declaring portions of 42 U.S.C. 402 unconstitutional was entered on June 17, 1975 (J.S. App. A). A notice of appeal to this Court (J.S. App. B) was filed on July 15, 1975. The time for docketing the appeal was extended by order of Mr. Justice Marshall first to Octo-

ber 13, 1975, and then to November 12, 1975. The jurisdictional statement was filed on the latter date. On February 23, 1976, this Court noted probable jurisdiction (A. 24). The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.

QUESTION PRESENTED

Whether Section 202(f) of the Social Security Act invidiously discriminates because it provides for widower's insurance benefits only if the widower had received at least one-half of his support from his deceased wife, whereas widow's insurance benefits are payable even though the widow had not received at least one-half of her support from her deceased husband.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 220(c)(1) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(c)(1), in pertinent part provides:

> The husband * * * of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62,
>
> (C) was receiving at least one-half of his support * * * from such individual [at the

> time she became entitled to old-age or disablity benefits—
>
> * * * * *
>
> and filed proof of such report within two years after the month in which * * * she became entitled to such benefits, and
>
> (D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,
>
> shall be entitled to a husband's insurance benefit * * *.

Section 202(f)(1) of the Social Security Act, as amended, 42 U.S.C. (Supp. IV) 402(f)(1), in pertinent part provides:

> The widower * * * of an individual who died a fully insured individual, if such widower—
>
> (A) has not remarried,
>
> * * * * *
>
> (B)(i) has attained age 60, or (ii) has attained age 50 * * * and is under a disability* * *,
>
> (C) has filed application for widower's insurance benefits * * *,
>
> (D)(i) was receiving at least one-half of his support * * * from such individual at the time of her death, or if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time

of her death, and filed proof of such support within two years after the date of such death * * * , or (ii) was receiving at least one-half of his support * * * from such individual at the time she became entitled to old-age * * * insurance benefits * * *, and filed proof of such support within two years after the month in which she became entitled to such benefits * * * and,

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit * * *.

STATEMENT

Appellee, after the death of his wife, applied to the Social Security Administration for widower's insurance benefits pursuant to Section 202(f) of the Social Security Act, as amended, 42 U.S.C. 402(f). Since appellee's public employment had not been covered by social security (J. S. App. A, p. 2a), he satisfied the requirement, not met by most men, that he not be entitled to old-age insurance benefits equal to or in excess of his deceased wife's primary insurance amount.[1] 42 U.S.C. (Supp. IV) 402(f)(1)(E). His application for widower's benefits was nevertheless denied because he failed to establish, as required by Section 202(f)(1)(D), that he had been "receiving at least one-half of his support * * * from [his wife] at the time of her death * * * or * * * at the time she became entitled to old-age or disability insurance benefits."

Appellee then instituted this suit in the United States District Court for the Eastern District of New York, requesting that that dependency requirement be declared unconstitutional, on the ground that no similar showing of dependency is required as a condition of eligibility for widow's insurance benefits (A. 5–17).

A three-judge district court was convened pursuant to 28 U.S.C. 2282. The court granted the requested relief on the basis of this Court's decision in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, and *Frontiero* v. *Richardson*, 411 U.S. 677 (J. S. App. A).

SUMMARY OF ARGUMENT

Under the equal protection component of the Due Process Clause of the Fifth Amendment, legislative

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[1] "Primary insurance amount" is the maximum monthly benefit payable to a retired worker covered by social security on the basis of his or her own earnings record. Section 215, 42 U.S.C. (Supp IV) 415. Beneficiaries other than the wage earner receive "secondary" or "derivative" benefits.

The other conditions of eligibility for widower's insurance benefits are set forth in Section 202(f)(1)(A) to (E). In particular, the widower may not have remarried and must have attained age 60 or, if disabled, age 50.

A woman in appellee's position, who applied for widow's benefits, would have been required to meet essentially the same conditions of eligibility, except that she would not have had to prove that she had been receiving at least one-half of her support from her deceased husband. See Section 202(e) of the Act, as amended 42 U.S.C. (Supp. IV) 402(e).

classifications for social and economic welfare programs like social security are constitutional if the classification has a rational basis reasonably related to the legislative purpose which motivated it. *Weinberger* v. *Salfi,* 422 U.S. 749, 768–769; *Richardson* v. *Belcher,* 404 U.S. 78, 81, 84; *Flemming* v. *Nestor,* 363 U.S. 603, 611. Gender-based classifications which meet this test are no exception. Cf. *Kahn* v. *Shevin,* 416 U.S. 351; *Schlesinger* v. *Ballard,* 419 U.S. 498.

In enacting a program of survivors' benefits for aged widows in 1939, and for aged widowers in 1950, Congress defined different standards of eligibility because of the differing social welfare needs of each class. Those differences arose from the fact that a very substantial proportion of aged widows found themselves in dire need upon the death of their spouse, while aged widowers were better situated because they had generally been self-supporting over most of their working lives. It was therefore rational for Congress in 1939 to provide aged widows with benefits without their having to prove that their husbands had supported them. Such a requirement would have been an unnecessary burden on the vast majority of such widows, who would qualify in any event; and it would have gratuitously increased the administrative complexity of the widows' benefit program.

In contrast, since the vast majority of widowers were not dependent on their spouses, it was rational for Congress to conclude in 1950 that the probable needs of this class warranted extension of survivors'

benefits to widowers only when they had been dependent on their wives for a substantial part of their support.

Even if there is some imperfection when the two classifications are compared, because some non-dependent widows, but no non-dependent widowers, receive survivors' benefits, this does not render the statute unconstitutional. *Weinberger* v. *Salfi, supra,* 422 U.S. at 777. Mathematical precision is not required for otherwise valid legislative classification. In social welfare programs, Congress may adopt a rough accommodation of interests, needs, and costs in an effort to arrive at practical and workable solutions. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 55; *Geduldig* v. *Aiello,* 417 U.S. 484, 495; Cf. *Flemming* v. *Nestor, supra,* 363 U.S. at 608–611.

Neither *Frontiero* v. *Richardson,* 411 U.S. 677, nor *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, renders the half-support requirement for widowers unconstitutional. *Frontiero* involved a classification which allowed married servicemen a pay supplement for their spouses, but denied such a supplement to married servicewomen unless they furnished half their spouses' support. The instant case does not involve the denial to women in the same situation as men equal compensation for equal work; it involves standards of eligibility for social welfare benefits reflecting differences in the probable social welfare needs of aged widows and widowers.

These differences also render *Wiesenfeld* inapplicable. In that case young widows, but not young

widowers, with children were eligible for a special survivors' benefit. This Court found that the legislative objective was not to meet the needs of the surviving parent, but to meet the need of the children for parental care. 420 U.S. at 648–649. That need was the same whether the father or the mother survived. Hence, it was irrational to furnish a surviving parent's benefit for the children of young widows, but to deny it completely for the children of young widowers.

Extension of widowers' benefits to non-dependent men would serve no rational purpose. On the contrary, it would furnish them a windfall. This is particularly true for men like appellee, who have little or no social security old-age benefits because they were covered by an alternative system such as federal civil service retirement. Extending benefits to such non-dependent men is unrelated to their probable social welfare needs. The district court's reasoning, which would extend benefits to non-dependent aged husbands, as well as widowers, would increase the current cost to the working generation, now paying for the benefits of the retired generation, by $447 million. Yet this enormous cost would be unrelated to the purpose of the statute.

ARGUMENT

THE SOCIAL SECURITY ACT'S REQUIREMENT THAT A WIDOWER, BUT NOT A WIDOW, HAVE BEEN FINANCIALLY DEPENDENT UPON THE DECEASED SPOUSE AS A CONDITION OF ELIGIBILITY FOR SURVIVOR'S BENEFITS IS CONSTITUTIONAL

INTRODUCTION

As will be developed more fully below (pp. 16–28, *infra*), the social security programs of survivor's benefits for widows and for widowers have different origins and have evolved separately over the years. The program of widow's insurance benefits was instituted in 1939. 53 Stat. 1364. Survivor's insurance benefits were not made available to widowers until 1950. 64 Stat. 483–485. The conditions of eligibility under the two programs, which have been subject to considerable revision over the years, have always been somewhat different (see pp. 17, 21, 24, 25, *infra*). At present, the principal remaining difference between the two programs is that an otherwise eligible widower must have been receiving at least one-half of his support from his wife, either at the time of her death or when she had become eligible for old-age or disability insurance benefits, whereas a widow is not subject to a comparable requirement.

Appellee challenges the constitutionality of this remaining difference between the two programs. His position, seemingly, is that the Constitution, through the mandate of equal protection inherent in the Fifth Amendment's Due Process Clause, requires that the benefit provisions of the Social Security Act be free of any gender-based distinctions (see Mot. to Aff. 7). His principal reliance is upon *Frontiero* v. *Richardson*, 411 U.S. 677, and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. But a close study of the opinions in those

cases demonstrates that they do not govern the outcome of this case.

In *Frontiero,* the Court held unconstitutional certain statutes (37 U.S.C. 401 and 403; 10 U.S.C. 1072 and 1076) that provided a married serviceman with a pay supplement (increased quarters allowance and dependents' medical and dental benefits), on account of his status as a husband, but denied such pay supplement to a married servicewoman unless she furnished more than one-half of her husband's support. The instant case does not involve a similar denial to women of equal compensation for equal work. Rather, we show, *infra,* pp. 28–36, it involves differing standards of eligibility for survivors' benefits, reflecting differences in the probable social welfare needs of aged married men and women, which justify different standards of eligibility for secondary benefits derived from their spouse's social security coverage.

There was no opinion for the Court in *Frontiero.* The plurality opinion of Mr. Justice Brennan rested upon the premise "that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. That premise was not accepted by a majority of the Court in *Frontiero,* and it has since been explicitly rejected by the Court. *Kahn* v. *Shevin,* 416 U.S. 351, 355–356. See also *Schlesinger* v. *Ballard,* 419 U.S. 498; *Reed* v. *Reed,* 404 U.S. 71.

The concurring opinions in *Frontiero* relied, without elaboration, upon *Reed* v. *Reed, supra.* That case involved an Idaho statute that preferred males to females in the selection of the individual to administer a decedent's estate. The Court held that that preference, the purpose of which was "merely to accomplish the elimination of hearings [to determine whether the husband or wife would do the more capable job of administration]" (404 U.S. at 76), was constitutionally impermissible. The nature of the classification, whether sexual or otherwise, was irrelevant to the analysis in *Reed,* which was based not upon special considerations relating to sexual classifications, but upon the long-settled rule that "[t]he Equal Protection Clause * * * den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." 404 U.S. at 75–76.

At bottom, therefore, *Reed* stands for the unexceptionable proposition that in a contest between two otherwise similarly situated individuals over a single, indivisible, judicially conferred benefit, the state's interest in furthering administrative convenience by avoiding an adjudication of respective qualifications is a constitutionally inadequate basis for granting the benefit to the one instead of to the other.

That proposition does not bear upon this case. First, this case, unlike *Reed,* does not involve competition between two individuals for a single, indivisible bene-

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fit. But more significantly, appellee here, unlike the wife in *Reed*, was not denied a benefit on the basis of administrative convenience. To the contrary, the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent. Thus, also unlike the wife in *Reed*, appelleee was afforded the opportunity, not available in *Reed*, of proving entitlement by showing that he was dependent upon his wife. For all of these reasons, the separate opinions in *Frontiero* offer no authoritative guidance for the resolution of the question presented here.

Nor is *Wiesenfeld* dispositive here. There the Court held unconstitutional a legislative classification that denied father's insurance benefits to surviving widowers with children in their care, while authorizing similar mother's benefits to similarly situated widows. The Court concluded that the restriction of benefits to surviving mothers was not rationally related to the underlying legislative purpose, which the Court determined to be "to provide children deprived of one parent with the opportunity for the personal attention of the other * * *" (420 U.S. at 648–649). The Court reasoned (*id.* at 651–652):

> Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of

> the sex of the surviving parent. * * * [T]his result makes no sense. * * * It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.[2]

---

[2] The Court further stated that the statutory classification in *Wiesenfeld* was "more pernicious" than that in *Frontiero* (420 U.S. at 645). Whereas "it was open to the servicewoman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her * * *[an applicant for father's benefits] was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child" (*ibid.*). There is, of course, no comparable defect in the statutory classification challenged here. See text, *supra*, p. 9.

The Court in *Wiesenfeld* also observed that the rationality of the statutory classification should be viewed from the perspective of the covered wage earner as well as that of the prospective beneficiary (420 U.S. at 645). But closer scrutiny of the *Wiesenfeld* opinion has persuaded us that, at least in cases such as this, the difference in perspective is one of merely rhetorical significance: the fundamental equal protection analysis is the same, whether the case is viewed from the vantage point of the wage earner or the beneficiary. The Court concluded in *Wiesenfeld* that, from the perspective of the wage earner, "benefits must be distributed according to classifications which do not without sufficient justification differentiate among *covered employees* solely on the basis of sex" (420 U.S. at 647) (emphasis added). Since under the statutory classification in *Wisenfeld*, as here, the sex of the covered employee was necessarily, in all hypothetical applications, the opposite of that of the beneficiary, the Court's statement is analytically indistinguishable in this context from the same statement with the term "potential beneficiaries" substituted for "covered employees": "benefits must be distributed according to classifications which do not without sufficient justification differentiate among *potential beneficiaries* solely on the basis of sex." That, in turn, is simply a statement, especially if proper scope is given to the clause "without sufficient justification," of the "rational basis" test applicable to this case.

The Court in *Wiesenfeld* thus focused not on the probable needs of young fathers, but on the probable need of the children for parental care.

That line of reasoning is inapplicable here. The widower's and widow's insurance programs respond to different welfare needs from those the Court found to underlie the statute challenged in *Wiesenfeld*. The purpose of the widower's and widow's insurance programs is to meet the probable economic needs of the individual elderly beneficiary; the benefits they provide are intended in large part to replace the economic support lost by a dependent elderly spouse upon the death of the wage earner, and they are tailored to achieve that objective (see pp. 16–28, *infra*).

Since neither *Frontiero* nor *Wiesenfeld* provides useful instruction with respect to the question presented here, guidance must be sought elsewhere. We begin with the settled proposition that "when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611). As this Court noted in *Richardson* v. *Belcher*, 404 U.S. 78, 81:

> A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is

> "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment.

The question here, therefore, is whether the challenged statutory classification has a rational justification that may reasonably be considered to have been within the contemplation of Congress. For the reasons we now discuss, we believe that that question must be answered in the affirmative.

A. THE DIFFERENCES BETWEEN THE PROBABLE NEEDS OF THE PRESENT RETIREMENT GENERATION OF WIDOWS AND WIDOWERS PROVIDE A RATIONAL BASIS FOR THE DIFFERENT STANDARD OF ELIGIBILITY FOR THE SURVIVORS BENEFITS CONGRESS PROVIDED FOR EACH CLASS

In order to determine whether differing statutory classifications are reasonable, it is first necessary to define correctly the classes involved, and to examine the reasons, legislatively articulated or judicially constructed,[3] which independently support the classifications. It is then necessary to compare the differences to determine whether they are justified in light of the statutory purposes. When this analysis is applied to

[3] Compare *McGowan* v. *Maryland*, 366 U.S. 420, 426 with *Weinberger* v. *Wiesenfeld*, supra, 420 U.S. at 648, n. 16. See Gunther, *Cases and Materials on Constitutional Law*, p. 662 (1975).

the respective social security benefits programs for aged widows and widowers of the present retirement generation, *i.e.*, over-60, striking differences in the probable benefit needs of each class appear, which justify the different treatment Congress provides for those two classes.

These factual differences in probable need are rooted in the social and economic realities which existed during the working lives of the great majority of the men and women who make up each class, including the role they played in the labor force, and the extent of the average income contributions by husbands and wives of this generation to the support of the family as a whole. In the discussion which follows, we separately analyze the origins of the programs for each class of beneficiaries in the light of the legislative purpose, which was to meet the probable benefit needs of the respective class. We then show that when these analyses are compared, the differences between the requirements for widows and widowers justify the statute's requirement that aged widowers, but not aged widows, must have depended upon their spouses for at least half their support in order to obtain survivors' benefits.

1. THE ALLOWANCE OF WIDOW'S BENEFITS WITHOUT PROOF OF DEPENDENCY RATIONALLY SERVES THE PROBABLE NEEDS OF AGED WIDOWS

As originally enacted in 1935, the old age provisions of the Social Security Act (49 Stat. 622) made no provision for continuing benefit payments to anyone

except the wage earner. In 1939 the Act was amended to provide benefits derived from the wage earner's coverage to other members of the family including wives, widows, children, orphans, and surviving dependent parents. *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 643. Husbands and widowers were not included at this time. 53 Stat. 1364. H.R. Rep. No. 728, 76th Cong., 1st Sess. 7, 111 (1939).

Under Section 202(d) of the Act as amended in 1939 (53 Stat. 1365), every widow of a fully insured individual who (1) had not remarried, (2) had reached the age of 65, (3) was living with the insured individual at the time of his death, and (4) was not entitled to primary insurance benefits on her own account, or whose benefits were less than ¾ of her husband's primary insurance benefits, was entitled to a widow's benefit.[4] The purpose of these provisions, like other amendments creating derivative benefits for members of the wage earner's family, was to meet the probable needs of the classes of beneficiaries defined. Of these, Congress determined that the presumptive needs of aged widows were particularly severe. The House Committee explained that (H.R. Rep. No. 728, *supra,* at 7, 11 emphasis added):

> Under a social-insurance plan the primary purpose is to pay benefits in accordance with the *probable needs* of the beneficiaries rather

[4] Under present law, the widow is entitled to monthly benefits if she is aged 60 (50, if disabled) and "is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of" her deceased husband. Section 202(e)(1)(D), as amended, 42 U.S.C. (Supp. IV) 402(e)(1)(D).

than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents. * * *

* * * * *

* * * The new plan will eliminate most lump-sum benefits and will substitute monthly benefits for those groups of survivors whose *probable need* is greatest. These groups are widows over 65, widows with children, orphans, and dependent parents over 65.

Congress thus provided benefits on the basis of the probable needs of aged widows as a class.[5] It eschewed inquiry into the individual financial status of the particular aged widow, except to the extent of a determination of the level of her own primary insurance benefits. The class of aged widows, therefore, was certain to include some members who had no need for benefits based on their husbands' coverage, *i.e.,* widows with an independent income or pensions from non-social security sources which rendered them non-dependent.

Thus from the beginning of the program for surviving widows in 1939, Congress included some non-

[5] The proposal for providing benefits to aged widows as a class on the basis of the class's presumptive needs originated in the 1938 Report of the Social Security Board, which President Roosevelt transmitted to Congress. See Report of the Committee on Economic Security, H.R. Doc. No. 110, 76th Cong., 1st Sess. 7 (1939). The Board reasoned that (*ibid.;* emphasis added): "Under a social insurance system the primary purpose should be to pay benefits in accordance with the *presumptive needs* of the beneficiaries, * * *. The payment of monthly benefits to widows and orphans, who are the two chief classes of dependent survivors, would furnish more significant protection than does the payment of lump-sum benefits."

dependent women within the class of aged widows to whom it gave benefits. It obviously assumed that this non-dependent sub-class was relatively small. Its primary focus was upon the probable need of the great majority of aged widows, as a class, for a source of income to replace the support contributed by their husbands.

This Court has recognized that need. In *Kahn* v. *Shevin,* 416 U.S. 315, 353–354, it noted:

> Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. * * * The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

These observations about the condition of aged women were no less apt in 1939 than when *Kahn* v. *Shevin* was decided in 1974.

As of 1939, and for many years thereafter, comparatively few wives were actually not dependent on their husbands. In 1940, out of all married workers actually living with their spouses, only 3.8 million women participated in the labor force, as against 26.2 million men.[6] Ten years later, in 1950, only 26

[6] *Sixteenth Census of the United States, 1940,* Vol. III, Table 6, p. 22.

such married women participated in the labor force for every 100 married men.[7] For widows of the present retirement generation, past discrimination in the job market and dependency on their spouses for support have caused severe adversity.

Thus, it has been observed (Women and Social Security: Adapting to a New Era, a Working Paper prepared by the Task Force on Women and Social Security for the use of the Special Committee on Aging, United States Senate,[8] Committee Print, 94th Cong., 1st Sess. 42 (1975)):

> As a group, aged widows have traditionally been the most economically deprived of the segments of the aged population. Older women living alone, the overwhelming proportion of whom are widows, had median incomes of $2,642 in 1973 when 33.4 percent of them lived below the poverty level.

The grave threat of poverty confronting aging widows is only one aspect "of [a] retirement income crisis now affect[ing] millions of aged and aging women, and threaten[ing] to engulf many more." *Id.* at 37. Thus even today (*ibid.*):

> The likelihood of being poor is considerably greater for elderly females than for aged males. More than two out of every three poor persons in the 65-plus age category are women. * * *

[7] *Bureau of the Census, A Statistical Portrait of Women in the United States, Special Studies Series P. 23, No. 58* (1976) (hereinafter "*Women*"), p. 30, table 7–4.

[8] Hereinafter cited as "Task Force Report".

> Poverty among elderly men, on the other hand, was markedly lower * * *.

In view of that general situation, Congress dispensed with any requirement that most aged widows prove that their husbands contributed to their support, and provided benefits to all members of the class who met the statutory criteria. In the original 1939 Act, this group was defined to include all widows living in the same household with their husband—which was by far the largest category. Widows who had been living apart from their husbands, however, were, under the 1939 definition of "living with" (Section 209(n), 53 Stat. 1378), also able to obtain benefits, by showing that deceased husbands had in fact contributed to their support.

Although that provision for the separated wife was restated in 1950,[9] it was eliminated in 1957, so that all otherwise eligible aged widows, regardless of whether they were actually living with their husbands, were allowed benefits without having to prove support. 71 Stat. 518. Congress apparently determined that this distinction in factors of eligibility between the two sub-classes of widows on the basis of residence was inconsistent with the original, and continuing purpose of widows' benefits.[10] Moreover, this proof-of-support requirement for women separated from their

[9] Section 216(h)(2), 64 Stat. 511.

[10] The amendment eliminating the "living with" requirement was added to the 1957 Social Security Amendments on the floor of the Senate. 103 Cong. Rec. 15301–15302 (1957). No explanations of the reason for eliminating this provision were given.

husbands unduly burdened those widows without making any meaningful contribution toward weeding out the non-needy, for such women may well have been among the neediest of all.

By eliminating the proof-of-support requirement for all widows, Congress furthered its basic design of providing benefits to widows as a class on the basis of the probable needs of the class, rather than on the basis of support contributed by their spouses. Of course, replacement of loss of support was a major factor underlying benefits for aged widows in 1939, in 1957, and today. But Congress was focusing on the widespread poverty of aged widows and integrating a remedy for that poverty into the social security scheme. It did not rely on an individual means test which could be satisfied by a legislatively prescribed presumption of dependency. (Cf. *Weinberger* v. *Salfi, supra,* 422 U.S. at 770–774.) Instead, it established a substantive standard of eligibility for the class as a whole, analogous to the substantive rules involved in *Weinberger* v. *Salfi, supra,* and *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 377.[11]

[11] Significantly, Congress did not use any terms indicating that it intended to create a presumption of dependency as it did, for example, for children who are "deemed dependent" under specified circumstances. Section 202(d)(3), 42 U.S.C. 402(d)(3).

Because the probable-need standard is so closely related to dependence upon the support of the husband in the majority of cases, it is convenient to describe the statute as presuming that married women of retirement age are dependent. Since use of this term confuses the presumption of need on which Congress relied, with the legislative prescription of a presumption, we do not use it in this brief.

Thus, Congress determined not to impose on the great majority of widows, who were in fact in desperate need as a result of the loss of their spouse's support, a dependency requirement which at best would weed out a small percentage of the non-needy.

As the Advisory Council on Social Security[12] recently observed:[13]

> [A] proof-of-support requirement for women as well as men would substantially increase the administrative complexity of the program and would require large numbers of dependent women to establish dependency on the husband in order to get exactly the same benefits they can get under present law.

Instead, by establishing a program of benefits for aged widows which dispensed with proof of support, Congress enacted a statute "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Kahn* v. *Shevin,* 416 U.S. 351, 355. Cf. *Weinberger* v. *Salfi, supra,* 422 U.S. at 776–777, 781–785.

[12] The Advisory Council is a statutory body required to submit to Congress a quadrennial review of the entire social security program. Section 706, 42 U.S.C. 907.

[13] Reports of the Quadrennial Advisory Council on Social Security, H.R. Doc. No. 94–75, 94th Cong., 1st Sess. 29 (1975) (hereinafter, "Advisory Council Report, 1975").

2. THE CONDITION THAT WIDOWER'S BENEFITS ARE AVAILABLE ONLY WHERE THE WIFE IN FACT SUPPORTED THE WIDOWER RATIONALLY REFLECTS THE NEEDS OF AGED WIDOWERS AS A CLASS

Viewed in terms of the probable needs of aged widowers as a class, the proof-of-support requirement is rational. In 1950, Congress extended benefits to the aged dependent husbands and widowers of women wage earners. 64 Stat. 483–485. The report of the 1949 Advisory Council on Social Security had recommended the provision of benefits to those recipients, stating (S. Doc. No. 208, 80th Cong., 2d Sess. 38 (1949):

> [S]upplementary benefits should be payable to the dependent husband (at age 65 or over) of a female primary beneficiary who was currently insured at the time she attained age 60. These husband's benefits would be comparable to the present wife's benefits for wives of male primary beneficiaries. Such benefits will be payable in relatively few cases, however, because the man would receive only the larger of the husband's benefit or his own primary benefit.

As enacted in 1950, husbands and widowers benefits were made available under the same rationale—the probable need of the class—that had been invoked for wives and widows. But those probable needs were different. The standard of eligibility for benefits was therefore defined differently to provide only for those widowers who were presumptively needy. The qualifications were the same as for widows, as redefined in the 1950 Act, including the requirements that the husband must have attained retirement age, and have been "living with" the wife at the time of her death,

in the sense of being a member of the same household or receiving contributions from her toward his support (64 Stat. 485, 512). As in the case of widows, widowers were not eligible unless either they were not entitled to old-age insurance benefits on their own account, or if entitled to such benefits, the amounts were less than their spouses' primary benefits.

Unlike aged widows, however, aged widowers were entitled to benefits only if they were receiving at least one-half of their support from their wife at the time she died or became entitled to old-age insurance benefits. As a practical matter, only husbands whose wives contribute 75 percent of the family income meet this test[14] (*i.e.*, half for her own support, and one-

[14] Congress intended that the half-support requirement be "subject to regulations of the [Social Security] Administrator in order to permit the latitude necessary to enable him to determine the existence of true support, rather than support or lack of it resulting from income attributable to a spouse under community property laws." S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950). Ordinarily, the Administration assumes that a husband and a wife living together share their total income equally for support purposes. Social Security Claims Manual, Sections 2625, 2628. The husband's support is computed by determining the husband's and wife's total individual income from all sources, excluding from this total any amounts not used for the support of either, and dividing the balance equally between them. If the husband's individual income is half or less than this equal division, the wife is deemed to have contributed to half his support. *Ibid.* Thus, to meet the statutory standard, a widower must have contributed no more than 25 percent of total family income at the time of his wife's death; conversely, the wife must have contributed at least 75 percent.

quarter more to make up her husband's half of the shared total).[15]

When Congress in 1950 extended benefits to husbands and widowers, it had a rational basis for limiting benefits to those members of that class who received the majority of their support from their wives. The situation of married men in the economy was almost the reverse of married women. In 1950, 86.8 percent of men were in the labor force, as against 33.9 percent of women. *Women,* Table 7–2, p. 28. Of married men living with their spouses, 91.6 percent were in the labor force as against only 23.8 percent of women. *Id.* at Table 7–4, p. 30. The median earnings of men, moreover, were as of 1960, approximately 40 percent higher than the median earnings of women who worked. *Id.* at Table 10–3, p. 48. Finally, as of 1950, 65.4 percent of men worked year round at full time jobs as against 36.8 percent of women. *Id.* at Table 9–1, p. 40.

In the period approaching the retirement years, when crucial quarters of coverage may be earned to be eligible for retirement benefits,[16] the figures were equally dramatic. In 1950, of persons between 45 and

[15] The half-support requirement made redundant the simultaneously enacted requirement that widowers who did not actually live with their wives must have been receiving support from them. Section 216(h)(3), 64 Stat. 512. This requirement was repealed in 1957 at the same time it was eliminated for widows. 71 Stat. 518. (See p. 21, *supra.*)

[16] "Broadly speaking, eligibility for benefits depends on satisfying statutory conditions as to (1) employment in covered employment or self employment (see § 210(a), 42 U.S.C. § 410(a)); (2) the requisite number of "quarters of coverage"—*i.e.*, three-month periods during which not less than a stated sum was earned—the number depending generally on age (see §§ 213–215, 42 U.S.C. §§ 413–415); and (3) attainment of the retirement age (see § 216(a), 42 U.S.C. § 416(a)), § 202(a), 42 U.S.C. § 402(a)." *Flemming* v. *Nestor*, 363 U.S. 603, 608.

54 years of age, 95.8 percent of men were in the labor force, but only 38 percent of women; between 55 and 64 years of age, the proportion was 86.9 percent of men, but only 27 percent of women. *Id.* at Table 7–2, p. 28.

These figures have striking consequences in the retirement years. In 1974, more than two out of three poor persons over 65 years old were women, and 18.3 percent were in households below the poverty line.[17] Poverty among elderly men was markedly lower—11.8 percent of the total male age group. Task Force Report, *supra,* at 37. Eight out of ten surviving men over 65 are married but 52 percent of aged women were widows (6.3 million). Of older persons living alone, five times as many are widows as are widowers. Task Force Report, *supra,* at 68–69.

Thus the probable needs of widowers as a class were dramatically different from those of widows. Because of this difference, Congress was justified in defining the class of widowers eligible for benefits more narrowly than it had drawn the class of eligible widows. Indeed, to have provided benefits to

[17] The 1974 poverty line was $2,352 for an aged individual (65–plus) and $2,958 for a two-person family headed by a person 55 or older. Task Force Report, *supra* at 37.

all widowers without regard to whether they were dependent upon their wives for support, would have been inconsistent with the legislative purpose of providing benefits to family members on the basis of probable need.

The half-support requirement for widowers thus reflected a rational distinction between needy and non-needy men who, for the most part, enjoyed in their retirement years the fruits of their active participation in the labor force over their lifetime. For the aged widow, the economy offered sparser fare. Congress therefore concluded that different treatment was warranted for each class.

3. THE DIFFERENT TREATMENT ACCORDED WIDOWS AND WIDOWERS DOES NOT DENY DUE PROCESS

When in 1939 Congress initiated a benefit program only for wives and widows, but not for husbands and widowers, its action was constitutionally permissible. As the Court recently noted in *Geduldig* v. *Aiello,* 417 U.S. 484, 495:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Particularly with respect to social welfare programs, so long as the line drawn by the State is

> rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486–487 (1970).

As we have shown above, the women's program for aged widows established in 1939 and the men's program for aged widowers established in 1950, viewed in their own terms, are each separately rational. The question here is whether the difference between the treatment of one category of widows and widowers, reflecting a permissible treatment of each category separately, becomes invalid when the categories are compared as part of the overall aged persons' benefit program. The answer is negative.

Since the two programs have rational bases, they represent a rational constitutional classification. When the two programs are compared, the difference in treatment is justified because the probable need of aged widows as a class is different from that of aged widowers. The reasons for extending survivors benefits to non-dependent widows do not require the extension of such benefits to non-dependent widowers.

As with all statutory classifications, there are imperfections. But the Constitution does not require that statutory classifications be drawn with mathematical precision. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78–79. The Social Security Act, like other complex programs for publicly financing important

social needs, is a "'rough accommodation' of interests [drawn] in an effort to arrive at practical and workable solutions." *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 55; *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69–70.

The fact that Congress has adopted a standard that in particular cases may be over-inclusive in terms of the statutory objective—to meet probable need—does not require Congress to ignore the objective. *Dandridge* v. *Williams,* 397 U.S. 471; *Kehn* v. *Shevin, supra.* Due process, in cases involving economic and social welfare programs, interposes "a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor, supra,* 363 U.S. at 611, *Richardson* v. *Belcher,* 404 U.S. 78, 84; *Dandridge* v. *Williams,* 397 U.S. 471, 484–486.

This standard is applied because of the highly complex factors which must be balanced in arriving at "practical and workable solutions." *San Antonio School District* v. *Rodriguez, supra,* 411 U.S. at 55. In the Social Security Act, Congress had to balance considerations of individual equity—measured by the benefits each wage earner receives for the taxes he pays—against the overall social adequacy of the system, in meeting the probable needs of beneficiaries whose cash benefits may substantially exceed the taxes collected on their employment.[18] See Advisory Council

[18] Cash benefits in relation to taxes paid have been skewed in favor of lower income workers and their dependents. Compare Report of the Committee on Economic Security, H.R. Doc. No.

Report, 1975, *supra,* at 10–12; *Weinberger* v. *Wisenfeld, supra,* 420 U.S. at 647 n. 14. It was also required to identify the varied economic and social interests involved, and strike a reasonable balance between the probable needs of various groups of beneficiaries, and the equally important objective of maintaining a soundly financed system which does not impose an undue tax burden on current employees and employers. (See discussion, *infra,* pp. 38–39; see also Appellant's Brief in Opposition to Motion to Affirm, pp. 6–8.)

The legislature alone has the means for revising the social security program in the light of the changing nature of our society, including the swiftly changing role of husbands and wives as dependents or as self-supporting individuals. Under the rationale of *Flemming* v. *Nestor, supra,* 363 U.S. at 610–611, as reconfirmed in *Weinberger* v. *Salfi, supra,* 422 U.S. at 768, great deference must be granted to the distinctions Congress has drawn in classifying beneficiaries.

The district court failed to recognize and give effect to the differences which Congress had perceived between the probable needs of the classes of aged widows and widowers as a whole. Instead it assessed the statute as if the provision for widows was "over-inclusive," because the absence of a proof-of-support

110, *supra,* at 3, with the Advisory Council Report, 1975, *supra,* at 11–12; "[E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation." *Flemming* v. *Nestor, supra,* 363 U.S. at 609–610.

requirement permits some non-dependent widows to receive benefits; and as if the provision for widowers was "under-inclusive," because the proof-of-support requirement denies benefits to the non-dependent sub-class of widowers. This approach is inconsistent "with the standards of legislative reasonableness enunciated in cases like *Dandridge* v. *Williams* and *Richardson* v. *Belcher*." *Weinberger* v. *Salfi, supra*, 422 U.S. at 777.

The careful prescription in *Weinberger* v. *Salfi*, explains how claims of discriminatory classification under the Social Security Act should be assesed.

Salfi upheld the provision requiring surviving spouses to have been married for at least nine months in order to receive survivor's benefits. But its reasoning also applies to other classifications under the Social Security Act. Applying the *Salfi* test here (422 U.S. at 777), the question is not whether Congress has precisely defined the classes which caused it concern. The question is whether its concern having been reasonably aroused by the differing probable needs of aged men and aged women, and in the light of social and economic realities which created both the needs and the differences, it may rationally conclude that different classifications will advance its objective of meeting those needs; and that the expense and other difficulties of individual determinations justify the inherent imperfection of its broad classifications.

Under this standard, the half-support distinction between aged widows and aged widowers is rational, even though it produces different results for the sub-

classes of non-dependent widows and non-dependent widowers.[19]

First, comparatively few married women of retirement age were non-dependent, while the reverse is true for aged married men. Of married women now of retirement age (*i.e.*, born before 1917), considerably less than 40 percent were in the labor force for a substantial portion of their married lives, or contributed more than half their husband's support.

Despite significant gains for women in the labor force, the Bureau of the Census has reported: "In 1960, working wives contributed, on the average, about 20 percent of their families' total income; in 1974 their earnings accounted for approximately 27 percent of the total family income." *Women, supra,* p. 46; see also *id.* at Table 10–10, p. 52. In contrast, almost all married men now of retirement age worked

[19] In defining these sub-classes, both widows and widowers who are entitled on their own account to old-age insurance benefits which exceed their spouses' are excluded, since the statute denies such persons benefits. Section 202(e)(1)(D) and (f)(1)(E), 42 U.S.C. (Supp. IV) 402(e)(1)(D) and (f)(1)(E). The sub-classes, therefore, consist of non-dependent widows and widowers who either were not engaged in covered employment, or whose covered employment over their working lives entitled them to old-age benefits less than their spouses.

For coverage of the Social Security Act, see Section 210, 42 U.S.C. 410. The principal categories of excluded employees are those who, with their employers, are excused from paying social security taxes because they are contributing to the Federal Civil Service retirement system (5 U.S.C. 8301–8348), to the Railroad Retirement System (45 U.S.C. 228a–228z), and to state and local government plans not covered by the social security system agreements under Section 218, 42 U.S.C. 418. There is also a miscellany of minor exclusions.

for a substantial portion of their married lives. In 1950, 91.6 percent of married men living with their spouses were in the labor force, as against 23.8 percent of women. *Women,* Table 7–4, p. 30. With the increase in the time for education, and changes in the social role of women, these figures, as of 1975, had shifted to 83.1 percent for men and 44.4 percent for women. *Ibid.* Even today, therefore, 55.6 percent of married women are not in the labor force. See also *Frontiero* v. *Richardson,* 411 U.S. 677, 689 n. 23; *Kahn* v. *Shevin,* 416 U.S. 351, 354 n 7; *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 643 n. 11.

Viewed from the standpoint of the present retirement generation, it may reasonably be inferred that few husbands were dependent at the time of their wives' death or retirement under the half-support requirement as administered by the Secretary. Under that test the wife must contribute at least 75 percent of the joint family income (50 percent of which is for her own support and 25 percent for her husband's) in order for her husband to claim dependency. See n. 14, *supra,* p. 25. Yet, as of 1970, in only approximately 12 percent of those families where the wife worked did she contribute more than half of the total family income, and in only three percent did she contribute more than three-quarters. (Linden, *Women: A Demographic, Social and Economic Presentation,* p. 34 (1973).) Even today, the median average contribution of the wife is only 27 percent. *Women, supra,* Table 10–10, p. 52.

Furthermore, the likelihood of a wife's or widow's dependence upon her spouse, and the likelihood that she is not self-supporting, is substantially greater when, as here, she is near retirement age. The Court has recognized that for women generally "the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Kahn* v. *Shevin, supra,* 416 U.S. at 353. For the elderly woman, perhaps a widow,[20] of an age qualifying her for benefits, the situtation is far worse. In 1974, 77.4 percent of men between 55 and 64 years of age participated in the labor force, but only 40.7 percent of women. After age 65, almost three times as many men as women remain in the labor force. *Women,* Table 7–2, p. 28.[21]

Furthermore, aged widowers as a class are not as needy as aged widows, both because of their work history, and the markedly lower incidence of poverty among elderly men. Task Force Report, *supra,* at 37.

A dependency test for all widows, the vast majority of whom were in fact in substantial need, would represent a burdensome requirement serving only the purpose of eliminating a small percentage of non-dependent women. Many of these almost certainly would be needy in any event. In contrast, requiring

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[20] Of all women over 65, about 52 percent (6.3 million) are widows. Task Force Report, *supra,* at 68.

[21] See also Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, on Economic Problems of Aging Women, 94th Cong., 1st Sess., 3 (1975).

widowers to prove half-support eliminates a high percentage of beneficiaries who fall outside the principal rationale of the survivor's benefits program—probable need.

B. EXTENDING SURVIVORS INSURANCE BENEFITS TO OTHERWISE ELIGIBLE NON-DEPENDENT WIDOWERS WOULD FURTHER NO RATIONAL PURPOSE

The present provision for widows benefits does not disadvantage widows, since they need not prove support in any event. It does not disadvantage those widowers who in fact were receiving more than half of their support from their wives, for they can meet the support requirement. The disadvantaged group therefore, consists of non-dependent men (*i.e.,* men who were contributing more than 25 percent of the family income), who meet the other statutory requirements for benefits. This is a relatively small proportion of aged men married to women eligible for their own social security old-age benefits, although the cost of extending survivors benefits to such non-dependent men is very high (see discussion, *infra,* pp. 38–39).

In addition to the age requirement (the widower must be 60), the primary benefits of these men from their own earnings must be less than their spouses' primary insurance amount (see n. 19, *supra,* p. 33). Section 202 (c)(1)(D) and (f)(1)(E). The half-support requirement is measured during the 12 months before the wife's death, unless untoward circumstances such as illness or unemployment pre-

vented the wife from contributing at least half of the claimant's whole support for at least three months of the support year. Social Security Claims Manual, Sections 2604 and 2605.

The number of aged married men with their own benefits who, during this final support period, were contributing more than 25 percent of family income and were therefore non-dependent, but who earned less than half of the family income during the bulk of their married lives (and so had a primary insurance amount less than their wives), is, proportionately, quite small. The Social Security Administration's Actuary estimates that out of 2.085 million aged husbands and 0.639 million aged widowers of insured women, approximately 104,000 husbands and 144,000 widowers had primary insurance amounts less than their spouses, *i.e.,* nine percent.[22] This figure closely correlates with data indicating that as of 1970, in only nine percent of families were the wife's earnings more than half but less than three-quarters of total family income. Linden, *supra,* at 34.

The other group affected are those who are non-dependent, but whose lifetime earnings were for the most part not covered by social security at all. These are principally retired public employees like the appellee, who were already receiving a government pension. See Amended Complaint, par. 9 (A. 14). Since the purpose of the statute was to meet the probable

[22] The methodology for these estimates is set forth in the Appendix to this brief, *infra,* pp. 1A–6A.

need of the class, there was no reason why those who were in public employment, or covered by other systems such as Railroad Retirement, should be given survivors' benefits. Such individuals already had a pension from employment excluded from the social security system because the employee was contributing to a separate system.

Projected to 1977, this group of aged husbands and widowers includes almost a quarter million men over 62 (247,000), which is 47.5 percent of the total of the estimated number of men (covered and not covered 520,000), who would become eligible if the half support requirement were eliminated (App., *infra*, p. 6A). No purpose would be served by giving this group double benefits.

Thus, appellee and similarly situated non-dependent spouses are not entitled to any relief which in effect enlarges the inevitable imperfections of the statutory classifications Congress adopted to meet the differing needs of aged widows and widowers. Such relief departs further from the statutory purpose by substantially increasing the class of non-dependents qualifying for secondary benefits who do not meet the standard of probable need. It creates a windfall that distorts the statutory scheme, and contributes to an irrational distribution of the payroll taxes levied upon currently productive employees and employers who finance the social security benefits of retirees, and their dependents and survivors.[23]

[23] The social security system is funded by the "current cost" method of financing: taxation of the currently employed and their employers, and immediate appropriation of those taxes by Congress to provide the fund from which benefits to deceased, retired and disabled workers and their beneficiaries will be paid. "In essence, the plan transfers money from one generation to another with the amount taken from the one generation being measured by the other generation's benefit requirements." Advisory Council Report, 1975, *supra*, at 45. Projected funding depends on actuarial prediction of benefits to be paid out under the Act's criteria. Any substantial expansion of benefits requires a concomitant adjustment in funding.

Moreover, such an extension irrationally imposes a further burden upon the already over-strained financing for the social security system. That system is presently threatened with a deficit because the current and projected cost of benefits exceeds the current and projected payroll taxes intended to finance them.[24] Elimination of the half-support requirement would add benefits for 520,000 aged husbands and widowers at a total cost in 1977 of $447 million (App., *infra*, p. 5A), including $211 million for aged widowers.[25]

As we have shown above, this substantial burden is unrelated to the purpose of the statute—to meet the differing probable social welfare needs of the current retirement generation of widows and widowers. The due process analysis outlined in *Weinberger* v. *Salfi, supra*, does not require that those differences

[24] The estimated deficit for 1974, expressed as the difference between cost, as a percent of taxable payroll required to meet benefits, and the payroll tax rate on employees and employers, was 0.77 percent. Advisory Council Report, 1975, *supra*, at 48. Today there are 30 beneficiaries for every 100 workers. *Ibid.*

[25] The cost may be as much as six times greater than this amount if the decision below is applied retroactively.

be disregarded when they have a rational basis. *Kahn* v. *Shevin, supra; Schlesinger* v. *Ballard, supra.*

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

METHODOLOGY USED IN PREPARING FIRST-YEAR COST ESTIMATES FOR A PROPOSAL TO ELIMINATE THE "ONE-HALF SUPPORT" DEPENDENCY REQUIREMENT FOR HUSBAND'S AND WIDOWER'S BENEFITS

I. COST FOR HUSBAND'S BENEFITS

A. When the estimate was made in 1974, the number of female retired workers receiving old-age insurance benefits was projected to January 1, 1975, by age groups. The total projected number for January 1, 1975, was 7,018 thousand.

B. Based on data from surveys of aged beneficiaries that were conducted by the Office of Research and Statistics, the probability that a female retired-worker beneficiary is married was computed by age groups. These probabilities were applied to the projected numbers of female retired-worker beneficiaries, by age group, to obtain an estimate of 2,438 thousand husbands of such retired workers.

C. Reports published by the Bureau of the Census contain data on the number of married couples in the U.S. population, classified by 5-year age groups of the husband crossed with 5-year age groups of the wife. (Separate data are shown for the age group 62–64 for husband and wife each.) These data were used to obtain an estimate of 2,253 thousand husbands aged

62 and over, from among the 2,438 thousand total husbands estimated in B. This number was distributed by age groups, 62–64 and 5-year age groups for 65 and over.

D. For the husbands obtained in C, the probability that the husband is himself insured for old-age insurance benefits was applied to the estimated number of husbands, by age group. This probability, for each age group, was assumed to be the same as the probability that a male in the total U.S. population, in the corresponding age group, is insured. The resulting estimate of husbands aged 62 and over who were not themselves eligible for old-age insurance benefits was 168 thousand. Since about 8 thousand husbands were receiving benefits under present law on January 1, 1975, the estimated number who would have been newly eligible for husband's benefits on January 1, 1975, if the one-half support dependency requirement had been eliminated on that date is 160 thousand.

E. From among the estimated 2,085 thousand husbands age 62 and over who were eligible for benefits on their own earnings records, it was estimated that 5 percent, or 104 thousand, could become eligible to a partial husband's benefit if the dependency requirement were eliminated. The monthly benefit payable to these husbands would be the amount by which the husband's benefit exceeds his own retired worker's benefit. The probability that the husband's benefit is higher than the male worker's benefit, estimated at 5 percent, was based upon program data for retired workers and wives in current payment status and the assumption that the distribution by amount of benefit for male workers (without wives) would be the same as the

distribution by amount of benefit for the insured husbands of female workers at each benefit level.

F. The estimated numbers of husbands who would become eligible if the dependency requirement were removed were projected to 1977. Benefit amounts, based upon average benefits for female workers, were applied to obtain the estimated amount of additional benefit payments in calendar year 1977, assumed to be the first full year. The projection and benefit payment computation are outlined below:

	Noninsured husbands (full benefit)	Insured husbands (partial benefit)	Total
Estimated number of newly eligible husbands (thousands):			
January 1, 1975	160	104	264
June 30, 1977	185	114	299
Estimated average annual amount, calendar year 1977	$1,168	$167	----
Estimated amount of additional benefit payments, calendar year 1977 (millions)	$216	$19	$235

II. COST FOR WIDOWER'S BENEFITS

A. The total number of widowers age 62 and over in the population in March 1973 was obtained, by age group, from Census Bureau reports. This number was 1,454 thousand.

B. The probability that the deceased spouse of a widower age 62 or over was insured at the time of her death was estimated, by age group, and applied to the widowers in A. The resulting total number of widowers age 62 and over of insured females was 691 thousand.

C. For the widowers obtained in B, the probability that the widower is himself insured for old-age insurance benefits was applied to the estimated numbers of widowers, by age group. This probability, for each age group, was assumed to be the same as the probability that a male in the total U.S. population, in the corresponding age group, is insured. The resulting estimate of widowers aged 62 and over who were not themselves eligible for old-age insurance benefits was 52 thousand.

D. For ages 60–61, a method essentially similar to the above yielded 3 thousand widowers, so that the total number of eligible widowers aged 60 and over was 55 thousand. Since about 3 thousand widowers were receiving benefits under present law on March 31, 1973, the estimated number who would have been newly eligible for widower's benefits on March 31, 1973 if the one-half support dependency requirement had been eliminated on that date is 52 thousand.

E. About 639 thousand widowers aged 62 and over were eligible for benefits on their own earnings records. It was estimated that about 144 thousand, or 22.5 percent of the total, could become eligible to a partial widower's benefit if the dependency requirement were eliminated. The monthly benefit payable to these widowers would be the amount by which the widower's benefit exceeds his own old-age benefit. The 22.5 percent estimate was based upon a study of a small sample of cases.

F. The estimated numbers of widowers who would become eligible if the dependency requirement were removed were projected to 1977. Benefit amounts, based upon average benefits for female workers, were applied to obtain the estimated amount of additional

benefit payments in calendar year 1977, assumed to be the first full year. The projection and benefit payment computation are outlined below:

	Noninsured widowers (full benefit)	Insured widowers (partial benefit)	Total
Estimated number of newly eligible widowers (thousands):			
March 31, 1973	52	144	196
June 30, 1977	61	159	220
Estimated average annual amount, calendar year 1977	$2,213	$478	----------
Estimated amount of additional benefit payments, calendar year 1977 (millions)	$135	$76	$211

G. An additional $1 million was estimated for disabled widowers aged 50–59.

III. TOTAL ADDITIONAL BENEFIT PAYMENTS IN CALENDAR YEAR 1977:

[In millions of dollars]

Husbands	$235
Widowers	211
Disabled widowers	1
Total	447

ESTIMATED NUMBER OF NEWLY ELIGIBLE PERSONS UNDER PROPOSAL TO ELIMINATE THE "ONE-HALF SUPPORT" DEPENDENCY REQUIREMENT FOR HUSBAND'S WIDOWER'S BENEFITS, BY GOVERNMENT PENSION CATEGORY, JUNE 30, 1977

A. The total numbers of husbands and widowers may be found in the Staff Memorandum dated May 12, 1976. An estimated 1 thousand disabled widowers

aged 50–59 were added to bring the total for June 1977 to 520 thousand.

B. The numbers of eligible husbands and widowers who are also insured and therefore eligible for old-age benefits are also shown in the Staff Memorandum.

C. Of the eligible husbands and widowers who are not insured for old-age benefits, estimates were made of the number receiving retirement benefits from other government pension plans. These very rough estimates were based on the sketchy data available on the numbers of persons receiving benefits from other government plans who were not also receiving social security benefits.

D. The estimates are summarized in the table below.

	Number (in thousands)	Proportion of total
Total husbands, widowers (including disabled widowers)	520	1.000
Eligible for social security retirement annuity under present law	273	.525
Not eligible for social security retirement annuity under present law	247	.475
Receiving a retirement annuity from:		
Railroad	54	.104
Civil service	83	.160
A State or local government plan	76	.146
None of the above	34	.065

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